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BEFORE THE ARIZONA CORPORATION COMMISSION

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**STAFF'S COMMENTS ON QWEST'S
MOTION FOR JUDGMENT ON THE
PLEADINGS**

IN THE MATTER OF THE FORMAL
COMPLAINT AGAINST ARIZONA DIALTONE,
INC. FILED BY QWEST CORPORATION TO
ENFORCE ITS INTERCONNECTION
AGREEMENT

I. Introduction

Qwest Corporation ("Qwest") filed a formal Complaint against Arizona Dialtone, Inc. ("AZDT") on December 17, 2007, alleging that AZDT was failing to comply with its Interconnection Agreement ("ICA") with Qwest. The Complaint related to a dispute between Qwest and AZDT over the implementation of the Federal Communications Commission's *Triennial Review Order* ("TRO")¹ and the *Triennial Review Remand Order* ("TRRO").² Simultaneously with the filing of its Complaint, Qwest filed a Petition for Arbitration under Section 252 of the Telecommunications Act of 1996 for arbitration of virtually identical issues relating to implementation of the *TRO* and *TRRO*.

A Joint Procedural Conference was held in this matter and the related Arbitration proceeding. AZDT and Staff were ordered to respond to Qwest's Motion for Summary Judgment in this proceeding and to Qwest's Motion for an Order Awarding Qwest's Requested Relief Regarding the Proposed TRO/TRRO Amendment based upon the Statements and Admissions of Arizona Dialtone, Inc., and Denying Arbitration of Alleged Billing Disputes, which was filed in the Arbitration proceeding. Following are Staff's comments on Qwest's Motion for Summary Judgment in this

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003), corrected by *Triennial Review Order Errata*, 18 FCC Rcd 19020 (2003) ("Triennial Review Order").

² *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Order on Remand*, 20 FCC Rcd 2533 (2005) ("Triennial Review Remand Order")

1 proceeding. Simultaneously with the filing of these comments, Staff is also submitting comments on
2 Qwest's Motion that was filed in the Arbitration proceeding.

3 Staff's review of the documentation in this case and the pending Arbitration proceeding
4 indicate that there are two issues in dispute between the parties relating to the *TRO* and *TRRO*'s
5 implementation. The first has to do with back-billing issues; and the second issue has to do with an
6 appropriate transition period to other arrangements. Staff believes that both of these issues can be
7 resolved in this Complaint proceeding. Depending upon the Commission's findings, AZDT may also
8 need to submit any back payments in installments to be agreed upon by the parties. Finally, Staff
9 does not have sufficient information before it to support Qwest' Motion for Judgment on the
10 Pleadings. Qwest has not provided sufficient information regarding the rates in the Amendment and
11 whether those rates are the same as the rates charged other carriers. Additionally, AZDT's pleadings
12 indicate that there may be other factual issues relating to the back billing issue that may be in dispute
13 making summary judgment inappropriate in Staff's view.

14 **II. Discussion**

15 A motion for judgment on the pleadings tests the sufficiency of the complaint, and judgment
16 should be entered for the defendant if the complaint fails to state a claim for relief. *Shannon v. Butler*
17 *Homes, Inc.*, 428 P.2d 990 (Ariz. 1967). In reviewing a motion for judgment on the pleadings, all
18 material allegations of the opposing party's pleadings are deemed to be true. *In the Matter of One*
19 *Singe Family Residence and Real Property Located at 15453 North Second Avenue, et al. v. State of*
20 *Arizona*, 912 P.2d 39 (App. 1996). The motion should only be granted if the moving is clearly
21 entitled to judgment. *Id.*

22 Staff does not support Qwest's motion for judgment on the pleadings with respect to its
23 Complaint for the following reasons.

24 **A. Count 1 – Arizona Dialtone Breached its Obligation to Enter An Amendment** 25 **Reflecting the FCC's Triennial Review Remand Order.**

26 With respect to Count 1 of Qwest's Complaint, a review of Arizona Dialtone's pleadings
27 indicates that there are some factual issues in dispute between the parties and that this is the reason
28 why AZDT has not signed the Qwest's proposed *TRRO* Amendment. As discussed above and in

1 Staff's Comments on Qwest's Motion in the Arbitration proceeding, the parties' are not in agreement
2 on an appropriate transition period. Staff is unable to determine what an appropriate period of time is
3 without more information from the parties. Staff believes, however, that the parties should be able to
4 come to some agreement on this issue.

5 Second, Qwest has not provided sufficient information on the rates that it proposes to charge
6 Arizona Dialtone in its Amendment and whether those rates are the same as those charged to other
7 similarly situated competitive local exchange carriers ("CLECs"). Qwest has also not explained if its
8 proposed TRRO Amendment is different in any respect from the TRRO Amendment it has executed
9 with other CLECs. It appears from AZDT's pleadings that AZDT has other fact based issues with
10 the back billing proposed by Qwest which AZDT should be allowed to air in an evidentiary
11 proceeding.

12 For these reasons, summary judgment is not appropriate on Count 1 of Qwest's Complaint.

13 **B. Count II – Arizona Dialtone's Failure to Implement the TRRO Violates Law and**
14 **the Parties' Interconnection Agreement.**

15 For the reasons discussed above under Count 1, Staff does not believe that Qwest is entitled to
16 judgment on the pleadings with respect to Count II.

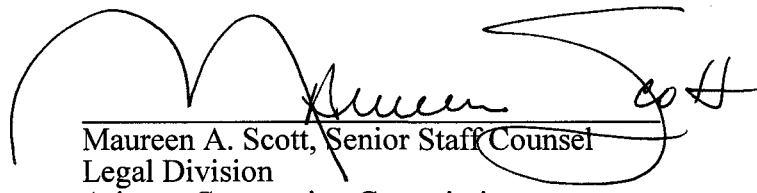
17 **C. Count III – Arizona Dialtone Breached its Obligation to Properly Compensate**
18 **Qwest.**

19 For the reasons discussed above under Count I, Staff does not believe that Qwest is entitled to
20 judgment on the pleadings with respect to Count III.

21 **III. Conclusion**

22 The Commission should deny Qwest's Motion for Judgment on the Pleadings.

23 RESPECTFULLY SUBMITTED this 22nd day of February, 2008.

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25 
26 Maureen A. Scott, Senior Staff Counsel
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1 Original and thirteen (13) copies
2 of the foregoing were filed this
22nd day of February 2008 with:

3 Docket Control
4 Arizona Corporation Commission
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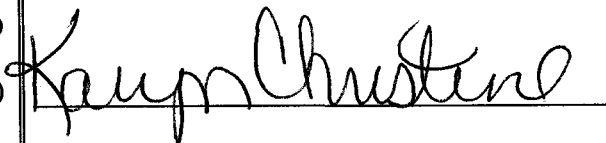
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